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No. 70

IN THE

Supreme Court of the United States

October Term, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents' brief has failed to meet the fundamental issue of the meaning of the Warsaw Convention[1] as written. Respondents argue, in complete disregard of the plain language of the Convention, that the provisions excluding or limiting liability do not apply unless the passenger has been given "notice". In the alternative, they argue that the Warsaw Convention is only a skeletal document into which the requirement of "notice", necessary to limit one's liability under national law, should be read. This position of respondents is in direct conflict with the clear wording of the Warsaw Convention, its drafting history, and the long-standing practice and understanding of the Parties, including the United States.

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, *et seq.*

Regardless of how respondents veil their argument, they are asking this Court to approve an amendment of the Warsaw Convention by judicial decision.

We shall deal, in this reply brief, with the basic errors in respondents' brief.

1. Article 3(2) of the Warsaw Convention in plain, simple, concise language, states that a carrier shall not be entitled to avail itself of the provisions of the Convention which exclude or limit liability "if the carrier accepts a passenger without a passenger ticket having been delivered."[2] This is the only circumstance mentioned in Article 3(2) justifying the imposition of this sanction. Nevertheless, respondents argue, and the Court below has held, that this sanction applies, not only in cases of non-delivery, but also where the delivered ticket does not notify the passenger that the Treaty limits the carrier's liability. This argument and the holding of the Court below are in direct conflict with the clear meaning of the terms of the Convention. The Warsaw Convention, as a Treaty and a contract among nations, must be interpreted according to its terms.[3] As was stated in *Valentine* v. *United States*, 299 U.S. 5 (1936):

> *"These must be fairly construed, but we cannot add to or detract from them."* 299 U.S. 5 at 11.

The words of a treaty:

> *"are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any arti-*

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[2] 49 Stat. 3015.

[3] *Maximov* v. *United States*, 373 U.S. 49 (1963); *Valentine* v. *United States*, 299 U.S. 5 (1936); *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931).

ficial or special sense impressed upon them by local law, unless such restricted sense is clearly intended." [4]

It is clear from a comparison of the plain language of Articles 3(2), 4(4) and 9 that the Parties to the Convention intended to limit the imposition of the sanction in Article 3(2) solely to cases of non-delivery of the passenger ticket.[5] For, while Articles 3(2), 4(4) and 9 all impose the same sanction for non-delivery, Articles 4(4) and 9 *in addition* expressly extend the sanction to cases where the baggage check or air waybill omits certain specified particulars listed in Articles 4(3) and 8. The drafters were meticulous in specifying those particulars which they intended to be compulsory in the baggage check and air waybill. Article 4(3) lists eight items for inclusion in the baggage check; Article 4(4) imposes the sanction if the baggage check omits any one of three of the eight particulars listed in Article 4(3). Article 8 lists seventeen particulars for inclusion in the air waybill; Article 9 imposes the sanction in the event the air waybill omits any one of ten of the seventeen particulars listed in Article 8.

In the case of the passenger ticket, however, no comparable language extends the sanction in Article 3(2) to cases where the delivered passenger ticket omits any of the five particulars listed in Article 3(1). Article 3(2) specifies non-delivery as the sole basis for the imposition of the sanction.

2. The argument of respondents and the holding of the Court below that the sanction in Article 3(2) applies, not only where no passenger ticket is delivered, but also where the delivered passenger ticket omits any of the particulars

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[4] *De Geofroy* v. *Riggs*, 133 U.S. 258, 271 (1890).

[5] 49 Stat. 3015-17.

listed in Article 3(1), are in direct conflict with the long-standing understanding of the Parties to the Warsaw Convention, including the United States. In 1955, based upon a proposal by the United States, Article 3(1) was amended to require the inclusion in the passenger ticket of a notice that the Treaty limits the carrier's liability, and the sanction in Article 3(2) was amended to extend to cases where the delivered passenger ticket fails to contain this notice.[6]

Although the Hague Protocol did not come into effect until August 1, 1963, is not in force as to the United States,[7] and does not apply to the case at bar,[8] the Court below has read the Hague Protocol requirement of "notice" into the unamended Warsaw Convention and has applied the Hague Protocol sanction against the petitioner. As characterized by Judge Moore in his dissenting opinion:

> *"The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability."* 370 F.2d 508 at 515 (A. 101a).

3. The drafting history of the Convention confirms the intent of the Parties that the sanction in Article 3(2)

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[6] II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 pp. 2-3 (1956). The Hague Protocol amending the Warsaw Convention has never been ratified by the United States and is not in force as to the United States. S. EXEC. DOC. H, 86th Cong., 1st Sess. (1959); S. EXEC. REPT. No. 3, 89th Cong., 1st Sess. (1965).

[7] S. EXEC. REPT. No. 3, 89th Cong., 1st Sess. p. 2 (1965).

[8] The transportation and accident involved occurred on February 25-26, 1960 (A. 12a).

be limited solely to cases of non-delivery of the passenger ticket. The preliminary draft of the Convention contained identical sanctions with respect to the passenger ticket, baggage check and air waybill. In this preliminary draft the sanction applied not only for non-delivery of the transportation documents, but also for the failure of the document to contain certain particulars.[9] Before final adoption of the Convention, however, the delegates deleted the language in Article 3(2) which would have extended the sanction to cases where the delivered passenger ticket omitted any of the listed particulars.[10] Comparable language, extending the sanction to cases where the baggage check and air waybill omit certain particulars, was retained in the final draft of Articles 4(4) and 9.[11]

Confronted with the plain language of the Convention and its drafting history, respondents, in an attempt to cast doubt upon the clearly expressed intent of the Parties, have confused the significance of statements contained in the Minutes of the Warsaw Conference. At page 32 of their brief, respondents quote excerpts from the Warsaw Minutes in support of their argument that the sanctions for the passenger ticket, baggage check and air waybill were intended to be identical. This was the *original* intention of the Parties. The statements quoted by respondents were made solely in reference to the preliminary draft of the Convention.[12] The objectives represented by

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[9] IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838 pp. 167-9 (1930). This document contains all of the recorded Minutes of the Warsaw Conference, and will be cited hereinafter as *"Warsaw Minutes,* ICAO Doc. 7838". The Minutes are recorded in French and all translations in this reply brief are the petitioner's.

[10] *Warsaw Minutes,* ICAO Doc. 7838, pp. 100-101, 129.

[11] *Warsaw Minutes,* ICAO Doc. 7838, pp. 104-8, 130-33.

[12] *Warsaw Minutes,* ICAO Doc. 7838, pp. 14-17, 159-176.

these preliminary remarks were later abandoned by the delegates. See the brief for the petitioner, pages 19-24.

Similarly, respondents have confused the scope of the Greek proposal which ultimately resulted in the restriction of the sanction in Article 3(2) to cases of non-delivery. The amendment to Article 3 proposed by the Greek delegate would have left to the courts the determination of whether the omission of any of the particulars from the passenger ticket resulted in damage justifying the imposition of the sanction.[13] The precise Greek proposal was not acceptable to the Conference, although the *principle* that the sanction should not apply for the mere omission of any of the listed particulars from the passenger ticket was adopted.[14]

Respondents state at page 37 of their brief:

> "It was stated by Mr. Youpis (Hellenic Republic) that sanctions would continue to be uniform as to all traffic documents."

To support this statement, respondents quote from the Warsaw Minutes certain remarks made by the Greek and Italian delegates. Clearly, these remarks do not lend any support to the statement of respondents. The quoted remarks were made in the course of final editing of the Convention by the delegates. The wording of the same particular contained in Articles 3(1)(e), 4(3)(h) and 8(q) of the final draft of the Convention was not identical. Articles 3(1)(e) and 8(q) referred to the liability rules "*established by* this Convention." Article 4(3)(h), however, referred to the liability rules "*under* this Convention." The remarks quoted by respondents refer only to

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[13] *Warsaw Minutes*, ICAO Doc. 7838, pp. 196-7.

[14] *Warsaw Minutes*, ICAO Doc. 7838, p. 101.

the desire of the delegates that identical language be used in all three Articles in describing the same particular.[15]

4. In their attempt to inject a notice requirement into the Warsaw Convention, respondents have urged an alternative ground. They say, in effect, that although there is no notice requirement in the Warsaw Convention, the Treaty is only a skeletal document into which a requirement of notice *should* be read, consistent with national law. If this were done, the fundamental objective of the Convention of establishing uniformity of the law in international air transportation would be subverted. This would also conflict with the official view of the Government of the United States that:

> *"its objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention."* [16]

The Parties to the Warsaw Convention were determined to avoid the resolution of any substantial issue by resort to national law. Early in the Conference, the delegate for Italy stated:

> *"In all cases we must keep away from the redress to national law."* [17]

The delegate for France summed up the consensus of the Conference most emphatically when he stated:

> *"We will make every effort to find a formula which gives satisfaction, but it is well understood, that from*

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[15] *Warsaw Minutes,* ICAO Doc. 7838, p. 129.

[16] DEP'T STATE PRESS RELEASE, No. 111, May 14, 1966.

[17] *Warsaw Minutes,* ICAO Doc. 7838, p. 44.

now on, we are absolutely opposed to a formula which will go back to the application of national law. It is the first time that one calls for the application of the national law and if one allows it on this question it will be called for on others. From our point of view we would also come to the destroying of the agreement, if one established the resorting to national law on each article.

* * * * *

[B]ut I beg the delegates not to enter on to this dangerous path which consists of reserving the solution of the litigation to national law." [18]

Where the Parties did agree to leave the resolution of any question to national law, an express reservation to that effect was provided in the Warsaw Convention. Such an express reservation appears in Article 21 (effect of contributory negligence of the injured person),[19] Article 22 (form of payment of damages and conversion of French francs into national currency),[20] Article 24 (persons who can bring suit under Article 17 for injury to or death of passengers),[21] Article 25 (conduct equivalent to wilful misconduct),[22] Article 28 (procedural questions in any action for damages brought under the Convention)[23] and Article 29 (method of calculating period of limitation for bringing suit.)[24]

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[18] *Warsaw Minutes*, ICAO Doc. 7838, p. 45.

[19] 49 Stat. 3019.

[20] 49 Stat. 3019.

[21] 49 Stat. 3020.

[22] 49 Stat. 3020.

[23] 49 Stat. 3020-1.

[24] 49 Stat. 3021.

No similar reservation is made in Articles 3 and 4. Nevertheless, respondents argue, in effect, that although there is no requirement of notice in the Warsaw Convention, the Convention should be read to permit each nation to decide for itself whether a notice of the limitation of liability should be required, the form of the notice, and whether the sanctions in Articles 3(2) and 4(4) should apply in the absence of such notice. This is an invitation to chaos in the interpretation and application of the Treaty, almost certain to result in as many separate and diverse decisions as there are Parties to the Treaty. Such a course would clearly lead to the destruction of the fundamental purpose of the Treaty of establishing and preserving uniformity in international private air law.

5. The position of respondents, and the decision of the Court below, are predicated upon national concepts of "notice" applicable where liability is sought to be limited by contract. In the same vein is the recent case of *Egan* v. *Kollsman Instrument Corp.*, 36 U.S.L.W. 2441 (N.Y. Dec. 28, 1967). Distracted by such concepts, applicable where national law governs, the Court below and respondents have failed to recognize that at issue here is not national law, but an *international* compact, a treaty among nations which supersedes any notion of national law. The *amici curiae* briefs filed in support of respondents suffer from the same defect.[25] At best they present arguments that, in view of the low limitation of liability established by the Treaty, "notice" of this limitation *should* be required. This is not the proper forum for such arguments. Moreover, "notice" of the Treaty limitations of liability can be made part of the law of the United States simply by the ratification of the Hague Protocol. These argu-

[25] Filed by the Airline Passengers Association, American Trial Lawyers Association, Bates Block and Arnold Holtzman.

ments, therefore, should be presented to the Executive and Legislative Branches of the United States Government as grounds for the ratification of the Hague Protocol.

Of course, any nation can, consistent with the Warsaw Convention, take whatever steps it considers necessary to bring to the attention of its nationals the fact that the Warsaw Convention may be applicable to their transportation and may limit the carrier's liability. This is precisely what the Civil Aeronautics Board has done in the United States.[26] The Board has taken steps within its jurisdiction to bring to the attention of American travelers the fact that the Warsaw Convention exists, that it may apply to their transportation and that it limits the carrier's liability. As the Civil Aeronautics Board recognizes, however, these efforts are independent of the Treaty and its requirements.[27]

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[26] See, 14 C.F.R. § 221.175.

[27] See the Memorandum for the Civil Aeronautics Board as *Amicus Curiae*.

CONCLUSION

The heart of this case is the Treaty and the fundamental question is whether a Court of the United States can write into a treaty a provision which the parties themselves had expressly rejected—whether international commitments of the United States should yield to concepts of national law. It is perhaps this question and its implications which prompted three of the Parties[28] to the Warsaw Convention to file briefs in this Court as *amici curiae*, stating that the decision of the Court below is in direct conflict with the clearly expressed intent of the Parties to the Convention and the continuous practice and understanding of the Parties since the Treaty was adopted.

The judgments of the Court below should be reversed, and the cause remanded with instructions to deny plaintiffs' motion for partial summary judgment.

Respectfully submitted,

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February 27, 1968

[28] Canada, Italy and the United Kingdom of Great Britain and Northern Ireland.

Certificate of Service

I hereby certify that I have this 27th day of February, 1968, served the foregoing Reply Brief for the Petitioner upon respondents, the International Air Transport Association, the Air Transport Association of America, the United States, Canada, the United Kingdom of Great Britain and Northern Ireland, the Republic of Italy, Airline Passengers Association, American Trial Lawyers Association, Bates Block, and Arnold Holtzman, *amici curiae*, by depositing same in the United States mailbox at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid addressed to the respective attorneys of record as follows:

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